THE
MADRAS LAW JOURNAL

1] JANUARY [1941

NOTES OF INDIAN CASES.

JADU NATH RAY v. PARAMESWAR MULLICK, (1940) 1 M.L.J. 97 =L.R. 67 I.A. 11=I.L.R. (1940) 1 Cal. 255 (P.C.).

In this decision the Privy Council deals with a point of practice relating to partition actions, namely, whether a mortgagee from a coparcener of his share in joint family property is entitled to come in and if so at what stage of a partition suit by a member of the family. Though there is a suggestion at one place in the judgment that their Lordships intended to elucidate the point with a view to clarify the procedure not merely in Bengal but elsewhere also (p. 260) the Privy Council has not in fact given any lead in the matter.

In England a mortgagee of the whole estate would not be a necessary party in a partition action but a mortgagee of a portion of the joint estate would be, Cf. *Swan* v, *Swan*[1], *Sinclair* v. *James*[2]. In India if a person sets up a title to any fund or property with the joint family pending a partition action "containing" the same, since the determination of that question would conduce to an ascertainment of the assets of the family available for purposes of division without the finding being challenged in any separate action, such a person would be a proper party in the suit for partition brought by any member of the family and O. 1, r. 10, of the Civil Procedure Code would allow of his being impleaded, *Ramaswami Chettiar* v. *Vellayappa Chettiar.*[3] Again in a suit for partition between a father and his sons since it would be desirable to have a predetermination of the binding character of any debts incurred by the father as against the sons, prior to the allotment of properties, it has been held to be inadvisable to dispose of the suit in the absence of the creditors who might re-open the whole question on the morrow of a decision that certain debts and charges were not properly charged upon the family

1. (1819) 8 Price 518=146 E.R. 1281. 2. (1894) 3 Ch. 554.
3. (1930) 60 M.L.J. 229.

estate with the result that the same question will have to be tried twice over with results probably discordant, *Shanmugha Nadan* v. *Arunachalam Chetty*[1], *Baluswami Iyer*, In re[2].

Where there is a mortgage subsequent to a suit for partition, of a coparcener's share it has been held that the mortgagee will be neither a necessary nor a proper party to the partition suit as his presence cannot affect the adjudication of shares and the allotment of properties, see *Annamalai* v. *Koothappudayar*[3]. Where however the mortgage is one created prior to the partition suit and the share of the mortgagor-coparcener is disputed in the suit the mortgagee will be entitled to come in in the partition action as a proper party and O. 1, r. 10, of the Civil Procedure Code would permit the addition, *Prafulla Kumar Mitra* v. *Dhirendra Lal Datta*[4]. Where the share of the mortgagor is not in dispute the Courts in India have adopted different practices in the matter of allowing the mortgagee to be represented in the partition action. A partition no doubt affects the interest of a mortgagee of an undivided share, since, after the partition his security is upon the divided share or the separate allotment. If the mortgage is of a special portion of the family property and possession of such portion can on partition be given to the mortgagor without any injustice to prior incumbrancers or to coparceners it would be the *duty* of the Court making the partition to give effect to the mortgage so as to "marshall" the family properties among the coparceners as to allot that portion or so much of it as may be just to the mortgagee, *Udaram* v. *Ramu Panduji*[5]. When accounts are taken and distribution consequent thereon is made it is but equitable that the share of the coparcener who dealt with the land should *cæteris paribus* be so made up as to embrace wholly or as far as possible the land which has been encumbered as belonging to such coparcener, *Pandurang* v. *Bhaskar*[6]. For these reasons, as recognised in the instant decision (p. 260), some High Courts would appear to join the mortgagee as party to the suit as a matter of course. In *Sadu Bin Raghu* v. *Ram Bin Govind*[7], it was held that it is both good sense and established law that all parties interested in the properties to be divided must be brought before the Court in one proceeding and that the mortgagee of a coparcener's share is a proper and even a *necessary* party to the partition suit. The principle has been applied that under O. 1, r. 10 of the Civil Procedure Code a person not originally a party

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1. (1921) 45 Mad. 194.
2. (1928) 51 Mad. 417, 439.
3. A.I.R. 1934 Mad. 485.
4. I.L.R. (1940) 2 Cal. 37.
5. (1875) 11 Bom. H.C.R. 76.
6. (1874) 11 Bom.H.C. 72.
7. (1892) 16 Bom. 608.

may be impleaded if his presence is necessary to completely and effectually determine the dispute so that it shall not again be raised in that or any other suit between the parties to the suit or between any of them and third parties, *Vydinadayya* v. *Sitaramayyan*[1]; Cf., *Montgomery* v. *Foy, Morgan and Co.*[2]. The practice in Bengal is different. In case of a decree for partition being made it is considered sufficient that the mortgagee should be given leave to come in and attend the partition proceedings as a *quasi party* after the passing of the preliminary decree and the appointment of a commissioner and that any application by such a person to come in at any earlier stage of the suit should be refused in the absence of *special* facts, *Mohindra Bhoosan Biswas* v. *Shoshee Bhoosan Biswas*[3], *Khetterpal Sritirutno* v. *Khelal Kristo Bhattacharjee*[4], *Jadunath Roy* v. *Murari Mohan*[5]. In the instant decision the Privy Council approves this practice. Sir George Rankin states that "it will in general meet the case if he is allowed to attend and be heard at that stage at which the making of a proper allotment is effected" (p. 261). Whether the statement amounts to a disapproval of the practice adopted by the other High Courts permitting a mortgagee of a coparcener's share to be added as a proper party under O. 1, r. 10 of the Civil Procedure Code even during the earlier stages of a partition action and in the absence of any *special* facts whatsoever, is a matter which is still left at large.

EMPEROR *v.* RAUTMAL KANIRAM, I.L.R. (1940) BOM. 38.

This decision holds that every Judge or Magistrate trying a criminal case has inherent power to direct the arrest of the accused in the case if the latter is trying to tamper with the prosecution witnesses or otherwise defeat the ends of justice, notwithstanding that an order for his release on bail had been passed by another Court or Magistrate who had seisin of the case at an earlier stage. The decision is more or less one of first impression and seems to run counter to S. 497 (5) of the Criminal Procedure Code, which states that a High Court or Court of Session, and in the case of a person released *by itself* any other Court may cause any person who has been released under that section to be arrested and committed to custody. The language of the section is clear that in the matter of re-arresting a person released on bail, the only Court apart from the High Court or the Court of Session that can act is the *very Court* that granted the bail. It follows as a necessary implication that no other Court can exercise such power. The mere fact that a Court has been directed

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1. (1881) 5 Mad. 52.
2. (1895) 2 Q.B. 321 (C.A.).
3. (1880) 5 Cal. 882.
4. (1894) 21 Cal. 904.
5. (1931) 35 C.W.N. 296.

to try the particular case cannot give it jurisdiction to order the re-arrest of an accused released on bail by another Court which had the seisin of the case at an earlier stage. The words "by itself" in S. 497 (5) mean the Magistrate who commits the man to custody and cannot include any other Magistrate of the same class, *Lakshmi* v. *Emperor*.[1] No Magistrate other than the one who has granted bail can cancel the same and order re-arrest, see *Imperatrix* v. *Sadashiv*[2] and *Maung Ba Chit* v. *Emperor*[3]. There is nothing to prevent an application being made to the Court of Session or the High Court where it is necessary and imperative that the accused should be re-arrested. To state as has been done in the instant decision that these Courts may not be available in an emergency to make an immediate order and therefore the Magistrate having seisin of the case should be deemed endowed with the necessary power is not an argument carrying conviction. Nor is it beyond doubt whether the Magistrate having seisin of the case can exercise any inherent power at all in the matter. S. 561-A of the Criminal Procedure Code deals with the inherent power of the High Court only. Assuming however that other Courts have also inherent powers, it is clear that such powers cannot be invoked in a matter regarding which there is a specific statutory provision, *see* *Assistant Govt. Advocate* v. *Upendra Nath Mukerji*.[4]

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1. (1933) 147 I.C. 1159.
2. (1896) I.L.R. 22 Bom. 549.
3. (1910) 10 I.C. 774.
4. A.I.R. 1931 Pat. 81.

EMPEROR v. RAMJI VALA, I.L.R. (1940) Bom. 500.

In this case it was held that on a notice under S. 439 (2) of the Criminal Procedure Code to enhance sentence passed on an accused convicted on a trial with a jury, the accused cannot challenge in showing cause against conviction under S. 439 (6) the verdict of the jury on facts. S. 439 (1) provides for the exercise by the High Court in revision of the same powers as it has on appeal. S. 423 (2) provides that the Court of Appeal cannot alter or reverse a verdict of the jury except on the ground of misdirection by the trial Judge or misunderstanding by the jury of the law as laid down by him. The clauses read together no doubt suggest that in revision the verdict of the jury on facts can be sought to be upset only on these grounds and on no other. S. 439 (6) however states that *notwithstanding anything contained in that section* any convicted person to whom an opportunity has been given of showing cause why his sentence should not be enhanced, shall in showing cause be entitled also *to show cause against his conviction.* The opening words of the sub-section are unambiguous. *Prima facie* they postulate that the scope of sub-S. (6) is not to be controlled by anything contained in sub-Ss. (1) to (5). To argue therefore that sub-S.(6) should be read merely as a provision designed to get over the bar arising under sub-S. (5), that where an appeal lies and no appeal is brought, a proceeding in revision at the instance of the party having the right of appeal shall not lie,—see *Emperor* v. *Jorabhai*[1] and *The King* v. *Nga Ba Saing*[2]—does not seem to be justified and is tantamount to substituting for the opening words of sub-S. (6) " notwithstanding anything contained in this section " the words "notwithstanding anything contained in sub-S. (5)." It follows therefore that S. 439 (6) is paramount to S. 439 (1) and hence to S. 423 (2). In other words where an accused is asked to show cause against enhancement on notice issued under S. 439 (2), even if the trial had been with a jury, he would be competent to show cause against conviction not merely on the narrow grounds open to him under S. 423 (2), had he himself preferred an appeal or revision, but on wider grounds as well by attempting to get reviewed the entire evidence. In England no appeal can lie by the Crown against adequacy of sentence imposed by the Judge at the trial. The question of enhancement can be mooted before the Court of Criminal Appeal only where an appeal had been preferred by the convicted person himself. In India no doubt the practice is different but there is nothing to indicate that the policy of the law is to encourage applications by the Crown to enhance the sentences awarded by the trial Court. The provision for reopening at the instance of the Crown the question of adequacy of sentence even like the provision empower-

1. (1926) I.L.R. 50 Bom. 783 2. A.I.R. 1939 Rang. 392.

ing the Crown to appeal against acquittals is only to make the law theoretically complete. The policy of the law being against applications for enhancement of sentences normally where such applications are in fact preferred, evidently the Legislature has intended that the accused should have the fullest freedom to show cause against the conviction without being tied down to particular grounds only. Whether such latitude should be available where the High Court has already dismissed an appeal or revision preferred by the accused is another matter and probably the principle of finality of judgments of the highest appellate authority would operate as a bar. Likewise what action the High Court should take where the accused has not acted in the matter and the Court has on an application to enhance sentence come to the conclusion that the evidence does not justify the conviction is also a different matter. The instant decision deals with a much narrower question, whether in showing cause against conviction under S. 439 (6) there being no other complications, the accused can invite the High Court to review the verdict of the jury on facts. In Calcutta the question has been consistently answered in the negative, *Khodabux Haji* v. *Emperor*[1] *and Alef Shaikh* v. *Emperor*[2]; see also *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Jnanendra Nath Ghosh*[3]. In Bombay the broader interpretation of S. 439 (6) has been favoured in *Emperor* v. *Ramchandra*[4], a view which is repudiated by the instant decision. In Allahabad though the decision in *Emperor* v. *Bishwanath*[5] holds that S. 439 (6) will have to be read with S. 423 (2) an earlier ruling of that Court had taken a different view, *Emperor* v. *Bansgopal*[6]. In Sind and Madras the construction adopted by the Calcutta High Court has been accepted, *Emperor* v. *Haji Kahmoo*[7] *and Ratnasabapathy Goundan* v. *Public Prosecutor*[8]. In view of the fact that judicial opinion has not been uniform and that the construction favoured in Calcutta and Madras does not give to the opening words of S. 439 (6) its full value, a more authoritative elucidation or a legislative clarification of the matter is certainly to be desired.

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1. (1933) I.L.R. 61 Cal. 6.
2. (1935) I.L.R. 62 Cal. 952.
3. (1929) I.L.R. 56 Cal. 1145.
4. (1932) 35 Bom. L.R. 174.
5. A.I.R. 1936 All. 850.
6. Cr. Rev. No. 523 of 1930 (Allahabad High Court).
7. A.I.R. 1926 Sind 233.
8. (1936) 71 M. L. J. 231: I.L.R. 59 Mad. 904.

NAGAPPA CHETTIAR *v.* ANNAPOORANI ACHI, (1941) 1 M.L.J. 164 (F.B.) :

This decision holds that r. 8 framed under S. 28 of the Madras Agriculturists' Relief Act providing for appeals from orders under S. 19 amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree as if the orders related to the execution, discharge or satisfaction of the decree within the meaning of S. 47, Civil Procedure Code is *ultra vires* the rule-making powers of the Provincial Government under the Act. The conclusion is reached mainly as flowing out of the principle that "an appeal does not exist in the nature of things ; a right of appeal from any decision of any tribunal must be given by express enactment," *Sandback Charity Trustees* v. *The North Staffordshire Railway Co.*,[1] *Attorney-General* v. *Sillem*[2], *Colonial Sugar Refining Co.* v. *Irving*[3]. *etc.* The argument is that the Madras Act IV of 1938 not having provided for an appeal such a substantive right can't be conferred by rules framed under the Act. It is submitted that this is a wrong approach to the question. It is well settled that where by statute matters are referred to the determination of a Court with no further provision the necessary implication is that the Court will determine the matters as a Court and that its jurisdiction is enlarged but that all the incidents of such jurisdiction including the right of appeal from its decision remain the same, *National Telephone Co. Ltd.* v. *Post Master-General*[4]. S. 19 of Madras Act IV of 1938 merely adds to the powers which the Court that passed the decree has already as a court of law. Hence no question of giving a right of appeal by implication or otherwise can arise at all. It is simply extending the jurisdiction of an existing court of law with all its incidents including a right of appeal, see *ibid.* pp. 552, 555 and 557. The observations of Lord Macnaghten in *Rangoon Botatoung Co., Ltd.* v. *The Collector of Rangoon*[5],—a case under Ss. 26 and 54 of the Land Acquisition Act before their amendment—in negativing a right of appeal to the Privy Council against an award which had been confirmed by the High Court on appeal are in no way inconsistent with the decision in the *National Telephone Company's case.* No appeal ordinarily lies from an award. S. 54 of the Land Acquisition Act prior to its amendment in 1921 however provided for one appeal. The right being an exception to the ordinary rule in the case of awards was evidently held as incapable of being extended so as to permit of a further appeal to the Privy Council. In *Secretary of State* v. *Chellikani Rama Rao*[6], Lord Shaw distinguished the *Rangoon Botatoung*

1. (1877) L.R. 3 Q.B.D. 1.
2. (1864) 10 H.L.C. 704
3. (1905) A.C. 369.
4. (1913) A.C. 546.
5. (1912) I.L.R. 40 Cal. 21 (P.C.)
6. (1916) I.L.R. 39 Mad. 617.

case on this very ground. His Lordship pointed out how the latter was a case where from beginning to end the proceedings were ostensibly and actually arbitration proceedings and as such there was no right to carry an award as to the value of the land further than to the courts specifically set up by the statute for the determination of that value. In *Minakshi Naidu* v. *Subramania Sastri*[1], the Privy Council held that an appeal will not lie from an order of the District Judge acting under S. 10 of the Religious Endowments Act of 1863 appointing a member to fill a vacancy in a committee. There again the policy of the Act was generally to prevent litigation in civil Courts relating to Endowments, see S. 18. The right of suit itself having been made conditional the view of the Privy Council that a right of appeal can't exist except by specific conferment can be understood. The decision of the Privy Council in *Secretary of State* v. *Chellikani Rama Rao*[2] elucidates the true position. That was a case under the Madras Forest Act, 1882. S. 10 of the Act had provided for an appeal from the order of the Forest Settlement Officer on applications in respect of certain claims to forest land under the Act to the District Judge and such appeal was to be filed within 30 days of the rejection of the claim. The question arose whether an appeal from the decision of the District Judge to the High Court would be incompetent, as being excluded by the terms of the statute. In holding that an appeal will lie to the High Court, Lord Shaw observed : " When proceedings of this character reach the District Court that court is appealed to as one of the ordinary courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code will apply." Lord Shaw further pointed out that where a new dispute is created and the ordinary courts of the country are seized of it, then it would in the opinion of the Board require " *a specific limitation to exclude the ordinary incidents of litigation,*" see also *Kamaraju* v. *Secretary of State*[3]. The same view is indicated by the Judicial Committee in *Ravi Veeraraghavalu* v. *Venkata Narasimhalu Naidu*[4], where it was held that though S. 69 of the Madras Rent Recovery Act, 1865, only provided for a regular appeal and no further appeal was provided from a decision of the District Judge on appeal from the Collector given by the terms of the Act itself, still an appeal would lie to the High Court from the order of the District Judge unless that right was taken away by express legislation or by some express provision of law. The Privy Council further held that apart from the law *in view of the actual practice since the passing of the Act to enter-*

1. (1887) I.L.R. 11 Mad. 26 (P.C.).
2. (1916) I.L.R. 39 Mad. 617 (P.C.).
3. (1886) I.L.R. 11 Mad. 309 (F.B.).
4. (1914) I.L.R. 37 Mad. 443 (P.C.).

tain such appeals their Lordships would not be disposed to interfere with such a practice "even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act to the Collector." The Madras Act IV of 1938 does not constitute a new forum or a new tribunal, nor does it enact any special procedure. It merely recognises a new *lis* which is to be decided by the existing ordinary Civil Courts. The fact that under s. 19 the Court is to act on an *application* can make no real difference. That being so the right of appeal which is an ordinary incident of the procedure of such courts will not be lost unless there is a specific curtailment. To apply therefore the rule that a right of appeal can't exist unless granted by express statutory authority does not seem to be warranted.

Under the Government of India Act, 1935, the Provincial Legislative authority is plenary in character subject only to the limits prescribed by that statute. Where such a legislature having plenary authority empowers by a legislative enactment the Provincial Government to make a rule, the scope of the Government's authority to make the rule is coterminous with the legislative power which confers the authority, subject to the qualification that nothing in the rules framed by the Government in exercise of its power shall in any way be inconsistent with or repugnant to the substantive provisions and dominant scheme of the legislation, see S. 28 (3) of Madras Act IV of 1938. This is reinforced by S. 49 (2) of the Government of India Act, 1935, which provides that subject to the provisions of that statute the executive authority of each province extends to the matters with respect to which the legislature of the province has power to make laws. It therefore follows that to the extent to which the executive authority can legislate, its power is plenary and all the more so where a plenary legislative body has conferred on the Government the power to make rules for the proper working of the Act.

The legislative function of the Provincial Government extends to the jurisdiction and powers of all courts with respect to any of the matters in List II and an enactment which has been held to fall under clauses 20 and 27 in the exclusively Provincial List has *prima facie* the power to deal with the jurisdiction and powers of all courts in regard to such matters. The words "of all courts" include any appellate court including the High Court. This is apparent from the clause which exempts the Federal Court from the ambit of Provincial Legislative authority, vide List II, cl. 2.

Also the matters relating to Civil Procedure being included in the concurrent Legislative List III, part I sub-clause 4 and the

necessary sanction having been given under s. 107 (2) it is clear that both the Provincial Legislature as well as the Provincial Government have the right to declare from time to time the form and the nature of the proceedings under the Madras Act IV of 1938 and also to provide for appeals from orders on proceedings under the Act. If that were so, it does not seem reasonable to hold that a Government empowered by a sovereign legislature should not be entitled to declare that a particular proceeding authorised by it shall be decided by courts as under a provision of the Civil Procedure Code which provides for a right of appeal.

EMPEROR *v.* FULBHAI JOSHI, I.L.R. 1940 Bom. 709.

This case decides an interesting question arising under the Child Marriage Restraint Act, namely, whether in a case where a bride, who not being a child herself, contracts a child marriage within the meaning of the Act, her parents would by virtue of their participation in the *kanyadan* ceremony lay themselves open to a prosecution under S. 5 of the Act as, having "performed, conducted or directed" a child marriage. Answering the question in the negative the learned Judges record their dissent from the ruling of the Allahabad High Court in *Munshi Ram* v. *Emperor*[1].

The Act contemplates three classes of persons as liable to be punished in respect of a child marriage. Ss. 3 and 4 deal with the punishment to be awarded to a male contracting a child marriage, he himself not being a child. S. 6 prescribes the punishment awardable to parents or guardians of a minor contracting a child marriage if they have done anything to promote such a marriage or have permitted such a marriage or have failed to prevent it from being solemnised. S. 5 declares liable to punishment *any one* who "performs, conducts or directs a child marriage." The section is general in terms and does not specify the particular class of persons intended to be covered by it. Two pieces of policy are however clear and will affect the construction of the section and a determination of its scope, namely, (1) a female contracting a child marriage shall not be punished; and (2) a female parent or guardian of a minor contracting a child marriage shall not be sentenced to imprisonment for an offence under S. 6. The last would suggest that parents could be held liable in respect of a child marriage, if at all, under S.6 only and not under S. 5 which does not have a proviso exempting a woman from imprisonment for an offence under that section, which however would surely have been pro-

1. A.I.R. 1936 All. 11.

vided had it been the intention of the legislature to render the parents liable to be charged under that section also. It may stand to reason that parents may be called to account if a minor under their charge contracts a child marriage and that is done by S. 5. Where however a person who is not a minor contracts a child marriage there cannot be any reason in holding them liable in respect of such a marriage as they may have no control at all over such a person in law. If S. 5 is construed as applicable to parents also then it will be to hold them liable to punishment in such cases as well. That S. 5 can apply only to strangers is also apparent for another reason, namely, that otherwise the concluding words of that section throwing upon the accused the burden of proving that he or she had reason to believe that the marriage was not a child marriage would be unmeaning, inasmuch as parents will surely know the age of their own children best of all persons, see *Public Prosecutor* v. *Rattayya*[1]. The section can thus apply to strangers only and not to parents, *Ganpat Rao Devaji* v. *Emperor*[2].

A clue to the scope of S. 5 is afforded by the marginal note which speaks of punishment for "solemnising" a child marriage. Though it is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act and that there is no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament (see *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh*[3], *Kesava Chetty* v. *The Secretary of State*[4], *Attorney-General* v. *Great Eastern Railway Co.*[5]) still the rule is by no means rigid and where there is a genuine difficulty in understanding a provision it has been held that "the side-note.... although it forms no part of the section is of some assistance inasmuch as it shows the drift of the section," *Bushell* v. *Hammond*[6], *Dharwar Urban Bank Ltd.* v. *Krishna Rao*[7]. Participating in *kanyadan* will certainly not amount to "solemnising" a marriage. The expression "performs, conducts or directs" a child marriage in S. 5 can advert only to the link—be it a religious ceremony or a formality sanctioned by the custom of the community —by which the matrimonial relationship is finally and beyond recall established. Acts of a preliminary nature or preparatory in character would thus stand excluded and in a Hindu marriage there won't

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1. I.L.R. 1937 Mad. 854.
2. (1932) 142 I.C. 277.
3. (1904) 26 All. 393 : 31 I.A. 132, 142-143.
4. (1918) 36 M.L.J. 222: I.L.R 42 Mad. 451, 453.
5. (1879) 11 Ch. 449.
6. (1904) 73 L.J.K.B. 1006.
7. I.L.R 1937 Bom. 293, 302-303.

be performance of the marriage by anything done till *saptapadhi*. Thus merely attending a marriage ceremony or applying for permission to hold a *nach* with music and fireworks *etc.*, will not amount to performing *etc.*, a child marriage.[1]

For the reasons indicated *supra* it will be difficult to accept the construction of S. 5 as including within its purview parents also and the ruling in the instant decision seems to be more in consonance with reason than the ruling in *Munshi Ram* v. *Emperor*[2].

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1. *Bachchu Lal* v. *Emperor*, (1936) 162 I.C. 389.
2. A.I.R. 1936 All. 11.

KONDAYYA RAO *v.* NAGANNA, (1941) 1 M.L.J. 336 (F.B.).

In this case a Full Bench of the Madras High Court has by a majority opinion held that on an absolute transfer of the *kudivaram* right in private lands lying within the ambit of an estate by a landholder—the *melvaram* right alone being retained by him—there is a conversion of the land into *ryoti* land and any covenants in the contract of transfer inconsistent with the incidents annexed to ryoti tenure by the Estates Land Act will be void to the extent of such repugnancy. The matter is almost one of first impression. A permanent right of occupancy is available to a person under the Estates Land Act only by virtue of possession of *ryoti* land in an estate at the commencement of the Act or by subsequent admission by a landholder to the possession of such land, S. (6). Accrual of permanent rights of occupancy thus stands conditioned upon the land being *ryoti*. This conclusion is supported by S. 181, which prior to its amendment in 1934 recited that nothing contained in S. 6, *etc.*, shall confer a right of permanent occupancy in a landholder's private land. Thus a permanent right of occupancy in regard to private lands in an estate can arise only if such lands shed their character as private lands, by the landholder converting them in the first instance into *ryoti* lands. Without such conversion permanent occupancy rights cannot be had in such lands. The position is made clear by the present S. 181 which states that a landholder shall be at liberty to *convert* his private land into *ryoti* land and *confer occupancy right in land so converted*. Ss. 6 and 181 read together suggest: (1) In an estate occupancy rights can exist only in ryoti lands, (2) even if land is ryoti still occupancy rights may not exist therein—*see* Ss. 6 and 8, and (3) where private lands are converted into ryoti lands occupancy rights therein can exist only by conferment *i.e.*, by admission of a person to the possession of such land with the necessary *animus*.

So in the case of lands which were at their inception private lands for permanent rights of occupancy to arise therein, there must be, firstly, a conversion of such land into ryoti land, and secondly, an admission by the landholder of a person to the possession thereof with intent to confer such rights. The Estates Land Act has not prescribed any method by which conversion could be brought about. Necessarily it will be a question of the intention of the landholder in each case as evidenced by the treatment he has accorded to the land whose character is in issue. The test of private land is whether the landholder cultivates it directly or intends to resume it for such cultivation even though from time to time he demises it for a season, *Bundley* v. *Bukhtoo*[1]; *Artharama Babu* v. *Artha Padhi*.[2] Where the evi-

1. 3 N.W.P. 283.
2. (1912) 25 M.L.J. 248.

dence showed that a landholder did not take the suit lands under his cultivation for more than twenty years, that ryoti pattas were issued regarding such lands and that they were included in the same patta which related to lands which were admittedly ryoti it was held that there was a conversion of the suit lands into ryoti lands, *Saravanaperumal* v. *Subbaiyyan Pillai*.[1] Where the right to take under direct cultivation is abandoned the land ceases to be private. The scheme of the Estates Land Act is, broadly speaking, to divide all cultivable lands in an estate into private lands and ryoti lands—*see* S. 3 (16)—and there is no presumption that any land is private, S. 185. If therefore any cultivable land has ceased to be private by reason of the right to take it under direct cultivation having been parted with, the land automatically becomes ryoti, for there is no *tertium quid*. Right of permanent occupancy is no doubt the main but by no means the sole characteristic of ryoti tenure. But where a landholder parts with the *kudivaram* right absolutely reserving to himself the *melvaram* interest alone he thereby gives up for ever his right to have the land under his direct cultivation; consequently the land ceases to be private land, *Saravanaperumal* v. *Subbaiyyan Pillai*.[1] *Kudivaram* right is synonymous with a right of occupancy, see *Venkata Sastrulu* v. *Seetharamudu*,[2] *Naina Pillai Marakayar* v. *Ramanathan Chettiyar*;[3] hence where *kudivaram* right in private lands within an estate is transferred absolutely a right of permament occupancy is thereby conferred on the transferee and that coupled with the retention of the *melvaram* right alone by the landholder operates constructively as an expression by him of an intention to give up his right to take such lands under direct cultivation at any time. The minority view in the instant decision does not sufficiently allow for the force of these factors. The Statement of Objects and Reasons to the Estates Land Bill mentions that the term *ryot* has been used as the appropriate designation for a cultivator possessing occupancy right. The intention of the Legislature thus seems to be that where occupancy rights are conferred regarding any land in an estate on a person such person should become a ryot and that the land in his possession is ryoti—*see* S. 3 (15).

RAMASUBBARAYA SASTRI *v.* VENKATA APPALANARASIMHARAJU, (1940) 2 M.L.J. 1021.

One of the points decided in this case was that an alienation by a coparcener of his share in the whole of the joint family property or in any part thereof would not sever his status from the

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1. (1922) 16 L.W. 802.
2. (1920) 37 M.L.J. 42=I.L.R. 43 Mad. 166 (P.C.).
3. (1923) 46 M.L.J. 337=I.L.R. 47 Mad. 337 (P.C.).

family and make him a divided member. This view may no doubt be in accord with the preponderance of judicial opinion in the Madras High Court—see *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*,[1] *Subba Rao* v. *Anantanarayana Aiyar*,[2] *Manjayya* v. *Shanmugha*,[3] *Maharaja of Bobbili* v. *Venkataramanjulu*,[4] *Kandasami Udayan* v. *Velayutha Udayan*,[5] *Jagannatha Rao* v. *Ramanna*;[6] see also *Gurlingappa v. Nandapa*[7]—but it is submitted that a conclusion the other way would be in greater consonance with modern trends in joint family law, at least in cases where a coparcener has alienated his entire interest in joint family properties. The capacity of a coparcener to alienate family property for his own purposes is not a topic dealt with by Hindu law texts. The Mitakshara merely declares that an unseparated sapinda has no power over the whole to make a gift, sale or mortgage. It is questionable whether alienation of his share by an individual coparcener was ever recognised by the Hindu jurists, see *Gurlingapa* v. *Nandapa*.[7] As pointed out in *Suraj Bansi* v. *Sheo Pershad*,[8] "there can be little doubt that all such alienations whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family", for according to the true notion of such a family no individual member can predicate of the joint property that he that particular member has a definite share, *Appovier* v. *Ramasubbier*.[9] As such alienations are inconsistent with the theory of Hindu law much help is not likely to be derived from a consideration of the Hindu law texts in the determination of that question, *Chinnu Pillai* v. *Kalimuthu Chetti*.[10] It is as a result of judicial decisions that a coparcener in Madras and Bombay possesses the power to alienate for value his interest in the joint family properties, see *Suraj Bansi* v. *Sheo Pershad*.[8] The decisions have held that when a coparcener so alienates, what the alienee becomes entitled to is what the alienor would get if a partition had been made immediately before the sale, *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*;[1] it is as if the sale is to operate as a partition at the time, *Hardi Narain Sahu v. Ruder Perkash Misser*,[11] Also attachment of a coparcener's share in execution of a decree obtained against him arrests the operation of survivorship in regard to such share, (*Suraj*

1. (1902) I.L.R. 25 Mad. 690, 717 (F.B.).
2. (1912) 23 M.L.J. 64
3. (1914) 26 M.L.J. 576=I.L.R. 38 Mad. 684.
4. (1914) 27 M.L.J. 409=I.L.R. 39 Mad. 265.
5. (1926) 51 M.L.J. 99, 104.
6. (1937) 2 M.L.J. 386.
7. (1896) I.L.R. 21 B. 797, 802.
8. (1878) I.L.R. 5 Cal. 148 (P.C.).
9. (1866) 11 Moo.I.A. 89 (P.C.).
10. (1910) 21 M.L.J. 246=I.L.R. 35 Mad. 47, 56 (F.B.).
11. (1883) I.L.R. 10 Cal. 626, 636 (P.C.).

Bansi's case)[1] and causes a severance, see *Madho Parshad* v. *Mehrban.*[2] If attachment by Court removes a coparcener's share beyond the range of survivorship and if the interest of the vendee under an alienation, whether voluntary or *in invitum*, is to be worked out as if there was a partition immediately before the alienation and the share of the vendee is not liable to be affected by subsequent happenings in the joint family of which the alienor was a member does not the inference become inevitable that on alienation of his share by a coparcener there is a severance of the alienor from the family?

Again it is now well settled that an unilateral declaration by a coparcener evidencing an unequivocal intention on his part to separate himself from the other members of the family operates to bring about a severance in status, *Suraj* v. *Iqbal*,[3] *Girjia Bai* v. *Sadashiv*,[4] *Bal Krishna* v. *Ram Krishna*,[5] *Ram Narain Sahu* v. *Mt. Makhana*,[6] *etc.* Manifestation of such intention may be express or implied and the intention may be actual or constructive. Does not an alienation by a coparcener of his share constitute an assertion of his individual right as against the rights of the family and cut at the very root of the joint status? If the conduct of one coparcener in *expelling* another would operate as a severance of the joint status as held in *Joy Narain* v. *Girish Chunder*,[7] will not the taking away of his share from the family by a coparcener by passing it on to an alienee be tantamount to an intention on the part of that member to sever himself from the family? Where a coparcener becomes a convert to an alien faith it is held that there is severance in status by reason of his having done an act inconsistent with the status of a joint Hindu family. Likewise if a coparcener contracts a marriage under the Special Marriage Act 1872 as amended in 1923 he is deemed to be severed from the joint family. In both these cases the law attributes to the coparcener in effect an intention to separate himself from the family. It is also held that when the estate of a coparcener has vested in the Official Assignee on his insolvency that estate would continue after his death and would not be defeated by survivorship, *Fakirchand* v. *Motichand*,[8] *Gori Shanker* v. *Official Receiver*.[9] If a coparcener relinquishes his interest in joint family property in favour of another coparcener the benefit of the relinquishment is held to accrue only to that one in whose favour it is made and the other

1. (1878) I.L.R. 5 Cal. 148 (P.C.).
2. (1891) I.L.R. 18 Cal. 157 (P.C.).
3. (1913) 24 M.L.J. 345=I.L.R. 35 All. 80=40 I.A. 40 (P.C.).
4. (1916) 31 M.L.J. 455=I.L.R. 43 Cal. 1031 (P.C.).
5. (1931) 61 M.L.J. 362=I.L.R. 53 All. 300=58 I.A. 220 (P.C.).
6. I.L.R. 1939 All. 680=(1939) 2 M.L.J. 569 (P.C.).
7. (1878) I.L.R. 4 Cal. 434 (P.C.).
8. (1883) I.L.R. 7 Bom. 438.
9. (1932) I.L.R. 13 Lah. 464.

members of the family will have no rights against such interest, *Peddayya* v. *Ramalingam*.[1] This is on the footing of an alienation by the relinquishing coparcener which places him in the position of a separated member, see *Balkrishna* v. *Savitribai*.[2] If an alienation in favour of a member of the family has that effect there is no reason why when the alienation is in favour of an outsider the same result should not ensue and the alienor placed in the position of a separated member. The arguments against construing an alienation by a coparcener of his share as causing a severance in status are: (1) alienation *per se* is not tantamount to the expression of an intention to separate, *Jagannatha Rao* v. *Ramanna*;[3] (2) the vendee gets under his purchase only an *equity* and nothing more, *Gurlingappa* v. *Nandapa*;[4] and (3) severance of joint family status can be effected only by a mode known to and recognised by Hindu law, *Lakshmanan Chettiar* v. *Srinivasa Iyengar*.[5] If it is permissible to a coparcener to deal with 'his share' it is rather strange to suggest that this predication of individual right is compatible with an intention to remain as a member of the joint family having common rights. The second argument overlooks that the reference to the vendee's right as an *equity* is not to be understood literally as negativing his legal right to his vendor's share, for it is well settled that the death of the alienor or the happening of any other event in the family of which he was a member could not in any degree affect or upset the vendee's title. Nor has the third argument much force. Severance of joint status is now permitted or happens in modes other than those recognised by Hindu law. There are on the other hand strong reasons why an alienation by a coparcener of his entire interest in the family properties should be held to operate as a severance in status. Such a view will ensure reciprocity of rights and avoid unfairness to the other members of the family. It will also make the law logical. The very fact of alienation by a coparcener puts an end to the fluctuating character of the property alienated and thereby effects a severance, *Chinnu Pillai* v. *Kalimuthu Chetti*,[6] see also *Soundararajan* v. *Arunachalam*,[7] *Lakshmi Achi* v. *Narayanaswami Naicker*.[8] This conclusion is also in consonance with the observations of the Privy Council made as early as 1869 in *Ram Chunder Dutt* v. *Chunder Coomar Mundul*[9] where it was said: "It is true that the status of the family as a joint Hindu family was not continuing.

1. (1885) I.L.R. 11 Mad. 406.
2. (1878) I.L.R. 3 Bom. 54.
3. (1937) 2 M.L.J. 386.
4. (1896) I.L.R. 21 Bom. 79.
5. A.I.R. 1937 Mad. 131.
6. (1910) I.L.R. 35 Mad. 47, 59 (F.B.).
7. (1915) I.L.R. 39 Mad. 159, 172 (F.B.).
8. (1929) I.L.R. 53 Mad. 188.
9. (1869) 13 Moo.I.A. 181, 198 (P.C.).

The alienation of the shares of two members of that family determined that status and substituted the status of co-sharers or joint owners whose rights as is shown by Lord Westbury in the case of *Appovier* v. *Ramasubbier*[1] are in many important respects distinguishable from those of a joint and undivided family". For these reasons it is highly desirable that the law relating to this matter should be settled finally and authoritatively.

Where a coparcener alienates either specific items or his share in such items, then, it may consistently with the doctrine that a person can remain undivided with reference to some items and separated as regards other items with the remaining members of the family, be argued that his status as regards the other items of joint family property remains unaffected; in other words, that the alienor ceases to be a coparcener only *quoad* the property alienated and the coparcenary is thereby reduced only *pro tanto*.[2]

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1. (1866) 11 Moo.I.A. 89 (P.C.).
2. *Krishnaswami Ayyangar* v. *Rajagopala Ayyangar*, (1898) I.L.R. 18 Mad. 73=41 M.L.J. 212; *Srinivasa Sundara Thathachariar* v. *Krishnaswami Iyengar*, (1912) 15 I.C. 854; *Lakshmi Achi v. Narayanasami Naicker*, (1929) I.L.R. 53 Mad. 188=57 M.L.J. 746.

ABDUL ROUF *v.* ABDUR RAHIM, I.L.R. (1940) 2 Cal. 520.

One of the points considered in this case was whether a portion of an entire decree for which execution was not once claimed can form part of a subsequent claim in execution. The English practice is that as a rule a judgment-creditor cannot issue a series of small executions upon his judgment making in the whole the amount of the judgment-debt; upon one judgment he can issue only one execution, *Forster* v. *Baker*,[1] *Rothschild* v. *Fisher*.[2] If however the judgment or order is for the recovery of payment of money and at the same time for the recovery of property other than money the appropriate writs for the enforcement of the two parts of the judgment or order may issue simultaneously or successively.[3] In India there is no statutory provision relating to this matter and the judicial decisions disclose no uniformity of view in the application of the principles of English practice either. There is no provision in the Civil Procedure Code under which a decree-holder can divide the decree into several parts and execute them piecemeal in different Courts or in the same Court. See *Panaji Girdharlal* v. *Ratanchand Hajarimal*,[4] *Kusum Kamini Deby* v. *Sailes Chandra Chakrabarty*.[5] Nor is there anything in the Code prohibiting piecemeal execution. See *Radha Kishen Lall* v. *Radha Pershad Singh*,[6] *Balasubramania Chetti* v. *Swarnammal*,[7] and *Panaji Girdharlal* v. *Ratanchand Hajarimal*.[4] The provisions of O. 2, r. 2 preventing multiplicity of suits are not in terms applicable to execution proceedings and according to the decision in *Balasubramania Chetti's case*,[7] S. 141 of the Code does not enable the application of such principles either.

As early as 1869, in a case under Ss. 207 and 208 of the Civil Procedure Code of 1859 , *Haro Sankar Sandyal* v. *Tarak Chandra Buttacharjee*,[8] it was indicated that the proper test regarding the non-permissibility of piecemeal execution would be whether the decree was or was not *perfect* for execution in its *entirety*. Sir Barnes Peacock, C.J., stated: "Where a decree is perfect for execution in its entirety the execution creditor cannot take out one execution for one part (*e.g.*, wasilat) and another for another part (*e.g.*, costs), nor can he by assignment split it up and subject the judgment-debtor to a plurality of execution." A different test seems to be pointed out in *Ram Baksh Singh* v. *Madat Ali*,[9] where it was stated that "where a decree was of a *complex* character and granted *different kinds of relief to be obtained by processes of different kinds*

1. (1910) 2 K.B. 686, 641 (C.A.).
2. (1920) 2 K.B. 243 (C.A.).
3. The Yearly Supreme Court Practice, 1937, p. 753.
4. (1933) I.L R. 57 Bom. 468. 5. (1934) 38 C.W.N. 1053.
6. (1891) I.L.R. 18 Cal. 515. 7. (1913) I.L.R. 38 Mad. 199.
8. (1869) 3 Beng.L.R. (A.C.J.) 114.
9. (1875) N.W.P.H.C. Rep. 95.

there was no valid objection to separate applications for partial execution of the decree." This is an approximation to the English rule set out *supra*. Thus where a decree is for possession of land and mesne profits it will be competent to the decree-holder to execute such decree by means of separate and successive applications in respect of each relief, *Sadho Saran* v. *Hawal Pande*,[1] *Veeraraghava Rao* v. *Gurunadha Rao*.[2] The same principle was held to operate where a decree was for possession of land and costs, *Radha Kishen Lall* v. *Radha Pershad Singh*,[3] *Chunilal Soth* v. *Gulabchand*.[4]

Under either test where a decree is simple and grants reliefs to be obtained by process of the same kind, that is, where there is only one *homogeneous* relief such as money or costs a single execution will have to be taken out for the whole sum due. In *Panaji Girdharlal's case*,[5] the Bombay High Court held that a judgment for principal and interest is a single money decree and cannot be said to give different forms of relief and that the provisions in O. 21, rr. 10, 11, 15, proviso to r. 17, and r. 64 are a clear pointer that the correct rule and certainly the rule of convenience is that a party having a right to execute a decree for money presently payable must enforce the whole decree at the same time. The same view was taken in *Shyama Charan De Thabildar* v. *Protap Chandra Das*.[6] See also *Kusum Kamini Deby* v. *Sailes Chandra Chakrabarty*,[7] *Prakash Chandra Sarkar* v. *Pande Ramnarain*,[8] *Chunilal Seth* v. *Gulabchand*[4] Singularly enough in the last case it is stated that where in contravention of the principle enunciated above, piecemeal execution is sought it is the duty of the judgment-debtor to raise the objection to the maintainability of the very first E. P. and if he failed to do so he cannot thereafter challenge either the validity of that application or the competency of any later E.P. for the realisation of the unrecovered balance of the decree amount. A similar view has found expression in *Upendra Nath Bose* v. *K.B. Dutt*,[9] where it is stated that the mischief of piecemeal execution can apply only to the earlier execution and does not apply to the later one. As pointed out by Beaumont, C.J., in *Panaji Girdharlal's case*[5] this dictum overlooks the real question, namely, not whether the first application is objectionable but what its *effect* is. The decision in *Upendra Nath Bose's case*[9] goes further and holds that in a case where a decree had granted costs both of the trial and of the appeal to the High Court, and an application had been made in the first instance to recover the

1. (1898) I.L.R. 19 All. 98 (F.B.). 2. (1915) 2 L.W. 688.
3. (1891) I.L.R. 18 Cal. 515. 4. A.I.R. 1931 Nag. 89.
5. (1933) I.L.R. 57 Bom. 468.
6. (1930) 34 C.W.N. 907 (later E.P. for interest not claimed in the earlier E.P. was held incompetent).
7. (1934) 38 C.W.N. 1058.
8. (1917) 43 I.C. 186. 9. (1926) I.L.R. 53 Cal. 582.

High Court costs, a later E. P. to recover the costs of the trial Court will not be incompetent. The decisions of the Calcutta High Court thus disclose no uniformity of view and fully justify the remark in the instant decision that the question regarding the permissibility of piecemeal execution has not been finally settled in that Court. In Madras, in *Balasubramania Chetti* v. *Swarnammal*,[1] it has been held that a decree-holder can present successive applications for realising different portions of what he is entitled to under his decree and in *Somasundaram Pillai v. Chokkalingam Pillai*,[2] the principle has been held to justify an application in the first instance for restitution of an amount recovered under a decree subsequently reversed on appeal, and a later application for the recovery of interest on such amount for the period during which the decree-holder had the use of the money.

SHRIDAR BALKRISHNA *v.* THE POONA MUNICIPALITY, I.L.R. (1940) Bom. 837.

This decision deals with a question of considerable practical importance, namely, what is meant by an order of a Court which dismisses a suit with costs, there being more than one defendant appearing separately,—whether the defendants get separate sets of costs or whether there is to be only one set of costs to be shared between all the defendants. In England such a question does not arise in practice, because the orders of the Court are drawn up in a formal manner and if the judge says: "suit dismissed with costs" the order does not contain those exact words but directs that the plaintiff do pay the defendants their costs to be taxed. In India, the Civil Procedure Code does not contain any prescription in regard to this matter. S. 35 leaves costs to the discretion of the Court. O.20, r.6 merely declares that the decree shall state the amount of costs incurred in the suit and by whom and in what proportions such costs are to be paid. O. 41, r.35 (3) lays down a similar principle regarding appellate decrees. Thus if a suit stands dismissed with costs with nothing more being said and there are a number of defendants the scope of the order becomes a matter of judicial construction. While Beaumont, C.J., and Wassoodew, J., remark in the instant decision that construing such language in their natural and proper sense it can only mean that the plaintiff must pay to each defendant a separate set of costs affirming the view taken by Beaumont, C. J., and Lokur, J., in *Mariyaya Chanviraya v. Shantirappa Danappa*,[3] an earlier decision of the same High Court in *Rustomjee Heerjee Bhoy* v. *Cowasjee Dadhabhoy*[4] has declared that it was an *invariable* practice on the appellate side of the High Court that unless otherwise specifically directed on

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1. (1913) I.L.R. 38 Mad. 199=25 M.L.J. 367.
2. (1916) I.L.R. 40 Mad. 780.
3. I.L.R. (1939) Bom. 478. 4. (1924) I. L. R. 48 Bom. 348.

an application made at the time the judgment is delivered in their favour with costs for the award of separate sets of costs, the order "appeal dismissed with costs" will mean that the losing party should pay one set of costs only to be divided among the successful parties. Likewise while the Calcutta High Court has held that when the Court orders the defendants speaking of them collectively to be paid their costs by the plaintiff it means that each defendant who appeared in the suit as a separate party is to be paid his separate costs—see *Gunesh Dutt Singh* v. *Mungay Ram Chowdhry*,[1] *Ramchunder Sen* v. *Koomar Doorga Nath Roy*[2]—the Patna High Court has in *Jagadish Prasad* v. *Mathura Prasad*[3] stated that when the judgment does not specifically award separate costs to the several defendants it cannot be taken to mean the award of such costs. The room for such conflicting views has now been considerably narrowed by the Fee Rules framed by the High Courts. The view of the Bombay High Court in the instant decision stands justified when understood in the light of the High Court Civil Circulars (p.196 of the Manual of Civil Circulars, 1925) containing directions as to when separate costs are to be allowed and when one set only is to be allowed when there are several defendants. One of the rules states that when several defendants having substantially one defence employ several pleaders they shall be allowed one set of costs only and that in such cases it will be for the plaintiff at the time of hearing to ask for a direction of the Court that separate costs be not allowed, and another rule lays down that when several defendants having separate defences are represented by separate pleaders they shall be entitled to separate costs.

In Madras the position is somewhat different. The rules framed regarding Practitioner's Fees under S. 27, Act XVIII of 1879, and kept in force even now, as well as rr. 12 and 13 of O. 6 of the O.S. High Court Fee Rules, 1933, enjoin that if several defendants who have a common interest succeed upon a joint defence or upon separate defences substantially the same, not more than one fee shall be allowed unless the Court shall otherwise order, and that if several defendants who have separate interests set up separate and distinct defences and succeed thereon a fee for one legal practitioner for each defendant may be allowed. Thus while in Bombay even where the several defendants set up substantially the same defence each defendant may get a separate set of costs unless the plaintiff applies to restrict the costs to one set only, in Madras, in such a case all the defendants will have to share one set of costs only unless on their application the Court has passed an order the other way.

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1. (1874) 21 W.R. 288.
2. (1878) 2 C.L.R. 152.
3. A.I.R. 1935 Pat. 41=154 I.C. 618.

SINNASWAMI GOUNDAN *v.* RAM GOUNDAN, (1941) 1 M.L.J. 519.

In this case it has been held that where a first mortgage is discharged by payments made at different times by two different persons, neither of whom would have been able to pay off the mortgage without the help of the other, there is no principle that it is only the person who makes the final payment in point of time that will be entitled to the right of subrogation and that both the persons can claim such right out of the sale proceeds of the mortgaged property. The conclusion is rested partly on the paucity of direct authority dealing with a similar situation (p. 522) and partly on equitable considerations. Clause (4) of S. 92 of the Transfer of Property Act merely lays down that a right of subrogation under that section shall not arise in favour of any person unless the mortgage in respect of which the right is claimed has been redeemed in full. This clause merely settles a point on which the decisions till then were somewhat conflicting and confirms the view taken by Mookerjee, J., in *Gurdeo Singh* v. *Chandrikah Singh*,[1] that subrogation could only be by complete redemption, *i.e.*, that subrogation could not be claimed so long as the mortgage is not redeemed in full.[2] There is however nothing in S. 92 which requires that the person claiming subrogation should himself have paid the entire amount of the previous debt, and in fact, cases have allowed subrogation when the prior mortgage has been discharged but only part of the money has been advanced by the subrogee, see *Rupabai* v. *Audimulam*,[3] *Saminatha* v. *Krishna*,[4] *Ram Sarup* v. *Ram Rachhpal*,[5] and *Abdul Razak* v. *Abdul Rahman*.[6] The English law also seems to be similar, namely, that if the whole debt be discharged it does not matter that some portion of it was paid by a third person.[7] If several persons pay separate sums which (taken together) discharge the first mortgagee they can get charges respectively in proportion to the amounts paid by them all in priority to the second mortgagee out of the sale proceeds of the mortgaged properties when they are sold outright, *Venkatarama Reddi* v. *Rangiah Chetti*.[8] It is not however stated whether such payments which cumulatively satisfy the first mortgage in full should have been substantially synchronous in point of time or whether the rule will govern even when the payments have been made in fact at different times and by different persons. The decision in *Hari Singh* v. *Jai Singh*,[9] relied on in the instant

1. (1909) I.L.R. 36 Cal. 193.
2. Mulla, Transfer of Property Act, 2nd Edition, p. 528. See also *Hanumanthaiyan* v. *Meenatchi Naidu*, (1911) I.L.R. 35 Mad. 183.
3. (1888) I.L.R. 11 Mad. 345.
4. (1915) I.L.R. 38 Mad. 458.
5. (1929) I.L.R. 51 All. 920. 6. (1933) 65 M.L.J. 390.
7. Jones on Mortgages, 7th Edition, S. 885 at pp. 438-439.
8. (1921) 41 M.L.J. 399 at 408.
9. I.L.R. (1937) All. 880 at 900 (F.B.).

decision is not really helpful. In that case three sets of vendees had purchased from the mortgagor different portions of the hypotheca and undertaken to redeem the first mortgage, which they did. In negativing their claim to subrogation, on the ground that the payments made by them were merely by way of fulfilling the obligations undertaken by them and that they had not obtained any agreement in writing registered regarding their right to subrogation, the learned judges remarked that otherwise the vendees who discharged the mortgage would have been entitled to rights of subrogation in proportion to the amounts paid by them if they had really redeemed the mortgage on their own behalf and come within the purview of the first paragraph of S. 92. Whether in so stating, the learned judges intended to declare that the right of subrogation can be claimed by each of the persons whose payments taken together brought about the redemption of the mortgage, irrespective of any question of the synchronous or successive character of such payments is difficult to infer. No doubt even where the payments by the three sets of vendees to the mortgagee were made on the same day, notionally, at any rate those payments might well be regarded as successive payments only and not as a single consolidated payment, as the learned judge in the instant decision points out. Any way, the observation in *Hira Singh* v. *Jai Singh*[1] is purely *obiter*. In Madras, the point has been dealt with in *Raja of Kalahasti* v. *Venkatappa Nayanim Bahadur*[2]—a decision of three learned judges in a Letters Patent Appeal—where it is declared that to claim subrogation the first requirement is that the mortgage must have been extinguished by a payment made *by the party claiming subrogation* and a person cannot stand by till the mortgage is extinguished by somebody else and then claim such charge. It follows therefore that where the extinguishment of the mortgage did not take place by the payment of the party claiming subrogation but by the payment made by some one else the former's claim is unsustainable. Judged by that test the conclusion reached in the instant decision would not be right and the person who had made the earlier payment can have no right of subrogation out of the sale proceeds of the mortgaged properties when they were sold outright. The observations in *Raja of Kalahasti* v. *Venkatappa Nayanim Bahadur*[2] being in favour of a view opposed to that adopted in the instant decision, a fuller consideration of the question is certainly to be desired.

NARAYANA GAJAPATHI RAJU BAHADUR *v.* JAGGAYYA, (1941) 1 M.L.J. 523.

This decision expounds *inter alia* the nature of the right of eviction available to a landholder under the provisions of the

1. I.L.R. (1937) All. 880 (F.B.). 2. (1928) 27 L.W. 544 at 567.

Madras Estates Land Act. S. 9 enjoins that a landholder cannot eject a ryot except in accordance with the provisions of the Act, from the holding or any part thereof, and S. 151 enables the landholder to apply for the eviction of a ryot only on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. Though it is the conjunction *and* and not the disjunctive *or* that is used in the latter section, still it is clear that the two phrases " materially impairing the value of the holding " and " rendering it substantially unfit " really imply the same idea and run into each other. This view is strengthened by S. 11 which declares that a ryot may use the holding in any manner which does not materially impair the value of the land or render it unfit for agricultural purposes, and by S. 187 (1) (*b*) which provides that no contract between the parties, at whatever time made, shall take away or limit the right of a ryot to use the land as provided by S. 11. The right of eviction in favour of a landholder can thus arise only if the holding has been materially impaired or made substantially unfit for agricultural purposes, *i.e.,* where there has been a *diversion* of the land from the main purpose of the holding to non-agricultural purposes, see *Narayana Rao* v. *Zamindar of Muktyala Estate*.[1] It is not possible to define with meticulous precision what would amount to a diversion of the holding from agricultural purposes. The question will be really one of fact dependent on the circumstances of individual cases, the size of the holding, the area withdrawn from agricultural purposes and the effect of such withdrawal upon the fitness of the holding *taken as a whole* for profitable cultivation, *Hari Mohan Misser* v. *Surendra Narayan Singh*.[2] If the holding as a whole is affected, then it would be immaterial whether the alleged acts of impairment were actually done over the entire holding or over parts of it only, *Rama Chetty* v. *Arunachalam Chettiar*.[3] It is however only a diversion *already effected* that can bring about a forfeiture of the holding and not a mere possibility or even the certainty of a diversion though in the near future, *Narayana Rao* v. *Zamindar of Muktyala Estate*.[1] Whether the erection of a structure or building in any part of the holding will amount to a diversion of the land from agricultural purposes will depend not only on the extent of the building, but the purposes which it is intended to serve, the object with which the building is raised and the various measures that are taken in respect of the land, *Narayana Rao* v. *Zamindar of Muktyala Estate*.[1] The conversion of one

1. (1928) I.L.R. 51 Mad. 478=54 M.L.J. 621.

2. (1907) I.L.R. 34 Cal. 718=17 M.L.J. 361 (P.C.)—case under S. 23 of the Bengal Tenancy Act corresponding to S. 11 of the Estates Land Act.

3. (1914) I.L.R. 39 Mad. 678=29 M.L.J. 724.

forty-eighth of a holding into a building site by enclosing that part with walls, by raising the level of that part of the holding and by raising two pillars to support a superstructure will not sustain a right to evict, *Rama Chetty* v. *Arunachalam Chettiar*,[1] *Sankaralinga Moopanar* v. *Subramania Pillai*.[2] Likewise the use of less than one-twentieth of the entire holding for constructing a building and for housing cattle and storing manure will be unobjectionable, *Zamindar of Seithur* v. *Dorai Venkataraju*.[3] The making of a *bandh* to prevent influx of salt water into the holding,[4] the erection of a masonry structure for dwelling on an insignificant portion,[5] the digging of a tank which was a practical necessity,[4] etc., will be acts of legitimate user and as such will not enable the landholder to eject the ryot. The construction of a cremation ghat[6] or the erection of a mosque[7] on the holding will not be acts of legitimate user and may give rise to liability of being evicted. The diversion of one out of two and one-third acres of land forming a holding for erecting a pucca residential house and a compound therefor will also amount to a diversion of land from agricultural purposes as would justify an eviction, *Narayana Rao* v. *Zamindar of Muktyala Estate*.[8] The user of one-sixteenth of a holding for the purpose of raising a building to store grain will not be objectionable as pointed out in the instant decision provided the storing is of the crop raised on the holding itself. The instant decision lays down a noteworthy principle in stating that in construing S. 151 the Courts have nothing to do with the policy of rural reconstruction and that a tenant cannot be permitted to take the law into his own hands and plead.

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1. (1914) I.L.R. 39 Mad. 678=29 M.L.J. 724.
2. (1915) 29 M.L.J. 514.
3. (1939) 1 M.L.J. 483.
4. *Raja Sati Prasad Garga* v. *Manmathanath Kar*, 6 I.C. 291.
5. *Naran Chandra Dalal* v. *Manindra Chandra Nandi*, 37 I.C. 999; *Hari Kisore Barna Sarma* v. *Barada Kishore*, I.L.R. 31 Cal. 1914.
6. *Dhirendra Kumar Roy* v. *Radha Charan Roy Chowdhury*, 57 I.C. 758.
7. *Srish Chandra Ganguly* v. *Rum Musalli*, (1934) I.L.R. 61 Cal. 75.
8. (1928) I.L.R. 51 Mad. 478=54 M.L.J. 621.

SHANKER VISHNU *v.* MANEKLAL HARIDAS, I.L.R. (1940) Bom. 799.

This case decides an interesting point in regard to the efficacy and operative character of an order of discharge of a debt passed under the provisions of the Central Provinces Debt Conciliation Act II of 1933, outside that province. It holds that where a promissory note was executed at a place within the Bombay Presidency—the promisor as well as the promisee being residents of that place—in a suit to recover the debt on that note brought in the Bombay Courts, a plea of discharge by virtue of an order passed by a Debt Conciliation Board in the Central Provinces functioning in the area wherein the debtor had some lands, will be no defence to such suit. Section 4 of the C.P. Act states that a debtor may apply to the Board appointed for the area in which any holding or land of the debtor is situate to effect a settlement between the debtor and his creditors.[1] On such application, if the Board deemed that a settlement was desirable, notice to creditors was to issue according to S. 8 requiring them to submit a statement of the debts owed to them by the creditor,[2] and sub-S. 2 lays down that every debt of which a statement is not submitted shall be deemed " for all purposes and on all occasions " to have been duly discharged.[3] Section 16 declares that no civil Court shall entertain any suit in respect of the recovery of any debt which has been deemed to have been duly discharged under S. 8 (2).[4] The debtor in the instant decision taking advantage of the C.P. Act by virtue of his owning some lands in that province applied under S. 4 for a settlement of his debts; the creditor received a notice but failed to submit any statement as required by the Act and thereupon the Debt Conciliation Board declared the debt to be discharged. Now it is well settled that the *lex loci contractus* governs the rights and incidents flowing out of contracts ordinarily. One of the incidents so governed is the discharge of contracts. If under the law of the place where the contract was entered into, namely, in this case the law obtaining in the Bombay Presidency, the contract can be discharged by a mode other than performance, such a discharge will be recognised and be binding on the Courts of that province. The true rule as explained by Dicey is: " a debt or liability arising in any country may be discharged by the laws of *that* country and such a discharge, if it extinguishes the debt or liability and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in Courts of that country but in every other country ".[5] *Prima facie,*

1. *Cf.*, S. 4 of the Madras Debt Conciliation Act.
2. *Cf.*, S. 10 (1), *ibid.* 3. *Cf.*, S. 10 (2), *ibid.*
4. *Cf.*, S. 19 (4), *ibid.*
5. Conflict of Laws, 5th Edition, p. 504.

therefore, the discharge of a debt incurred in the Bombay Presidency by residents of that Presidency in a mode not provided or recognised by the laws of that province will be no answer to an action on the debt. On this subject S. 37 of the Indian Contract Act has provided that the parties to a contract must perform their promises "unless such performance is dispensed with or excused under the provisions of this Act or *of any other law.*" As pointed out by Wort, J., in *Sadanand Jha* v. *Aman Khan*,[1] the section itself provides for a possible dispensation to the parties to the contract as appears from the latter part of the section, and thus in cases in which the facts come within the provisions of the Usurious Loans Act strict performance is excused. The most important statutory discharge of contracts outside the Indian Contract Act is that which follows on bankruptcy.[2] The expression "any other law" in S. 37 has nowhere been defined. Still it is clear that it can refer only to a law passed by a competent legislative authority with reference to India, co-ordinate with or superior to that which passed the Act; in other words the law must be one having an all-India operation territorially. The C.P.Debt Conciliation Act is professedly an enactment which extends to the whole of the Central Provinces only.[3] Bombay and the Central Provinces are both of them no doubt part of British India but as pointed out in the instant decision where the law of one province is distinct from the law of another province, the two provinces have to be regarded for this purpose as foreign countries *inter se.* It therefore follows that a mode of discharge of contracts recognised by the law of one province cannot in any manner affect a contract entered into in a different province when there is nothing to indicate that the incidents of the contract were not to be regulated by the law of the place where the obligation was incurred. Thus the discharge granted to the debtor by the C.P.Debt Conciliation Board cannot preclude the recovery of the debt due through the Courts in Bombay under the Bombay law which was the law applicable to the case having regard to the fact that the promissory note was executed in the Bombay Presidency and both the parties to the transaction were residents of that province.

VELAYUDHAM PILLAI *v.* SUBRAMANIA PILLAI, (1941) 1 M. L. J. 617.

This case attempts to indicate the precise scope of the Full Bench ruling in *Rama Rao* v. *Venkataramayya*,[4] deciding that

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1. (1938) I.L.R. 18 Pat. 18 at p. 41 (F.B.).
2. *See* the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.
3. Section 1 (2) of the C.P.Debt Conciliation Act.
4. (1940) 2 M.L.J. 257=I.L.R. (1940) Mad. 969.

certified copies of returns made by an assessee to the Income-tax Officer were admissible in evidence. It holds that there is no warrant to regard the Full Bench ruling as countenancing the view that it is obligatory on an assessee to obtain and produce to the opposite party in a suit copies of the returns, if the opposite party desires to inspect them. Order 11, r. 14 of the Civil Procedure Code deals with the Court's power to order production of documents and corresponds to O. 31, r. 14 of the Rules of the Supreme Court which is couched in almost similar terms. Under these rules it will be lawful for the Court in the exercise of its discretion to order the production by either party to the action of such of the documents in his possession or power relating to any matter in question in such cause. On the language it is clear that no order for production can be made against a party unless the document is in his possession or power, *Rameswar* v. *Rikhanath Koeri*,[1] *Laxman Rao* v. *Gayadin*,[2] and such possession must be sole legal possession, *Kearsley* v. *Phillips*,[3] *Coomes* v. *Hayward*.[4] An income-tax return made to the Income-tax Officer not being a document in the possession or power of the assessee, it follows that an order under O. 11, r. 14 of the C.P.Code cannot be made against him. That apart, S. 54 (1) of the Indian Income-tax Act declares the particulars contained in an income-tax return to be confidential and provides that no Court shall require except in the specified cases any public servant to produce such a document and sub-S. (2) penalises the disclosure of such particulars. It is inevitable that a Court of law should approach in a critical spirit any legislation which is calculated to impede a Court in the discharge of its duty to administer justice by preventing it from obtaining any material evidence of a nature likely to assist it to ascertain the truth, *Rowell* v. *Pratt*.[5] But at the same time the Court will have regard to the essential spirit underlying the prohibition in considering its scope, namely, that the foundation of the prohibition is that certain information cannot be disclosed without injury to the public interest, *Asiatic Petroleum Co.* v. *Anglo Persian Oil Co.*[6] Applying these principles, in *Shaw* v. *Kay*,[7] where the pursuer endeavoured to obtain production of the defender's income-tax returns for the purpose of proving that he was in a position to repay a loan, the Court of Session (Lord Pearson) held that the Court could not order such production on the ground of "confidentiality and public interest". For similar reasons

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1. A.I.R. 1920 Pat. 131, 136.
2. I.L.R. (1937) Nag. 266; *see also* Bray's Digest, Arts. 31 and 32.
3. 10 Q.B.D. 36, 40; *Ibid*, 486 (C.A.).
4. (1913) 1 K.B. 150.
5. (1938) A.C. 101, 104.
6. (1916) 1 K B. 822.
7. (1904) 5 Tax Cases 74.

in *Ankin* v. *London and North Eastern Railway Co.*,[1] the production of reports made in pursuance of S. 6 of the Regulation of Railways Act, 1871 (34 and 35 Vict., c. 78) to the Minister of Transport by the Railway Officials in regard to injuries sustained by a railway passenger was declined to be ordered on an application by the injured party for such production. Likewise in *Rowell* v. *Pratt*,[2] it was held that a return made to the Potato Marketing Board set up by the Agricultural Marketing Act, 1931, by a grower, was privileged from production in legal proceedings by virtue of S. 17 (2) of the Act. The test employed in all these cases would seem to be whether the communication or document of which production is sought is one which the public interest requires should be kept confidential. If the test is satisfied, the secrecy attaching to the document will be deemed to be applicable if production is called for in a legal proceeding even if the legislature has not specifically so stated, see *Rowell* v. *Pratt*.[3] As pointed out in (1940) 2 M.L.J. 25 at p. 26 (N.I.C.) no policy of the law would be defeated where the very person who made the return proposes to prove its contents. Totally different considerations will however arise where it is a stranger to the return that wants to avail himself of it and against the maker of it and for that purpose seeks to compel the latter to procure a copy of the return from the authorities and produce the same. Certified copies of income-tax returns will no doubt be available to an assessee by reason of r. 99 of the Income-tax Rules while it will not be available to others, but the very confidential character of the document requires that its contents ought not to be divulged to the detriment of the assessee or against his wishes.

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1. (1930) 1 K.B. 527.
2. (1938) A.C. 101.
3. *Ibid.*, p. 118 (per Lord Maugham).

SUBBARAMAYYA *v.* VENKATASUBBAMMA, (1941) 1 M.L.J. 724.

One of the questions in the Questionnaire issued by the Hindu Law Committee recently appointed by the Government of India is: "Should any provision be made to place the legality or otherwise of anuloma or other inter-caste marriages beyond doubt?" The justification for the question is made apparent by the decision under notice which almost for the first time in 35 years after the pronouncement of the Allahabad High Court in *Padam Kumari* v. *Suraj Kumari*,[1] dealing directly with the point, decides that an anuloma marriage is at the present time altogether invalid and suggests that if a change in the law is felt necessary we can look only to the Legislature. The conclusion in the Allahabad case lent itself to the criticism that it had been reached without any elaborate examination of authorities; the same cannot be said of the instant decision which deals with most of the materials available on the point though cases like *Melaram Nudial* v. *Thanooram Bamun*,[2] *Ram Lal Shookool* v. *Akhoy Charan Mitter*,[3] *Khairu* v. *Fakir Chand*,[4] *Nalinaksha Majhi* v. *Rajani Kanta Das Mohanta*,[5] *Suran Chand* v. *Indar*,[6] and *Appibai* v. *Khimji Cooverji*[7] which touch and consider the question have not been referred to. The decision under notice is also noteworthy in that it seems to be the first unequivocal pronouncement within the last two decades to reject the view in favour of the validity of anuloma marriages which had found acceptance with the Bombay, Calcutta, Madras and Lahore High Courts ever since the decision in *Bai Gulab* v. *Jiwan Lal*.[8] According to the instant decision an anuloma marriage is no longer valid because of the following reasons: (1) the absence of general consciousness of Hindu Society about the validity of such marriages, (2) invariable usage not to permit such marriages at least for a thousand years past, (3) the ripening of the recognition *cum* condemnation of such marriages by the Smritis into a definite prohibition by the time of the Puranas, and (4) the refusal by works like the Smriti Chandrika even to discuss the rights of anulomajas indicating a definite popular consciousness at the time when they were written or compiled that such sons had no status whatever.

The utility of identity of caste in marriage consists in the attainment of an unseen result (dharma). In such cases a principle of the Mimamsa states that "no substitute is to be allowed with regard to the unseen aspect of the prescribed ori-

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1. (1906) I.L.R. 28 All. 458.
2. (1868) 9 W.R. 552.
3. (1903) 7 C.W.N. 619.
4. (1909) 2 I.C. 944.
5. (1931) I.L.R. 58 Cal. 1392.
6. A.I.R. 1934 Lah. 550.
7. (1934) I.L.R. 60 Bom. 455.
8. (1921) I.L.R. 46 Bom. 871.

ginal".[1] Thus strictly speaking there can be no possibility of substituting a bride belonging to a different caste for one belonging to the same caste. Again, when there is a prohibition in the sacred texts of the doing of any particular thing, if such prohibition is only implied, a counter-enjoining may be provided though only secondarily but if the prohibition is direct no counter provision will be admissible. The question therefore will be whether marriage is regarded exclusively as a training in dharma, and whether the prohibition, if any, in the Shastras of anuloma marriages is express and explicit or merely implied. The object of marriage is really fourfold, namely, enjoyment, birth of a son, eligibility to perform religious duties and attainment of *asrama*. This has been recognised by the Shastras, as is apparent from the very provisions for different types of marriages like Brahma, Gandharva, etc. It is practically indisputable that the Smritis while contemplating anuloma marriages at the same time disapprove of them, as for instance, by remarking that such marriages are only for conjugal felicity and not for religious duties. While Manu at one place allows anuloma marriages,[2] by the very next verse he condemns the marriage of a Sudra woman with a member of any other caste. It is possible to construe the condemnation not as a prohibition (निषेध) but as giving an option (विकल्प) by the application of the maxim विरोधे तु विकल्पः ।. Medhatithi and Kulluka have in fact so read the texts. Narada,[3] Vishnu,[4] Vasishta[5] and other Smriti writers also allow anuloma marriages. The Dharma Shastra of Yagnavalkya however expresses more than a mere disapproval of such marriages.

यदुच्यते द्विजातीनाम् शूद्रादारोपसंग्रहः ।
नैतन्मम मतं यस्मात्तत्रायं जायते स्वयं ॥

—What has been stated (by Manu and others) regarding a twice-born taking a bride from a Sudra (family), that is not my doctrine, because he is born again in his son.[6] The fact that other verses[7] show that if at all a person is inclined to depart from such doctrine he can do so on the lines indicated in those verses, or that certain verses[8] prescribe the mode in which anuloma marriages may be celebrated, or that some verses[9] specify the appellations to be borne by the different classes of anulomajas, or that anulomajas are stated to be *santa* (good) while pratilomajas are declared *asanta* (non-entities)[10] or that provisions are to be found as to the mode in which anulomajas are to share the patrimony[11] cannot in any way detract from the censure of anu-

1. Mimamsa, V, vi, 8. 2. III, 18. 3. XIII, 5.
4. XXIV, 4. 5. Ch. VIII, S. 1-3. 6. I, 56.
7. I, 57. 8. I, 62. 9. II, 91, 92.
10. II, 95. 11. II, 125.

loma marriages indicated in the earlier text of that sage. Even as Yagnavalkya has more pronounced views on this question than the other Smritikars, so also the Smriti Chandrika among the later commentaries has adopted an almost hostile attitude towards such marriages refusing even to discuss the rights of anulomajas. It is conceded by Shah, J., in *Bai Gulab* v. *Jiwan Lal*[1] that anuloma marriages would be invalid if *prohibited* by the texts but not if they are merely *obsolete*. The learned judge however came to the conclusion that there was no prohibition whatever. On the other hand Somayya, J., in the instant decision points out that when an institution is shown to be obsolete there is no necessity to go further and show that there is an express prohibition against such an institution either in the law books or in usage having the force of law. He also expresses the opinion that if a prohibition is in fact necessary such a prohibition is also found at any rate in commentaries like the Smriti Chandrika. In this connection it may be noted that in *Sambasivan* v. *Secretary of State*,[2] in considering the text of Yagnavalkya postulating the right of a preceptor or pupil to succeed to the property of a man dying without heirs, the Madras High Court observed that though the claim was novel so far as the Courts were concerned, a direction of the texts could not be ignored as obsolete and negligible when it involved no inequity or conflict with modern ideas. The proper approach therefore to the question of the validity of anuloma marriages at the present time would seem to be to ascertain whether in the particular locality or among the community concerned the institution stands rejected at the present time. The observation of Chandavarkar, J., in *Bai Kashi* v. *Jamnadas*,[3] that it was reasonable to infer that according to the leading authorities on Hindu law as recognised in the Presidency, a Sudra wife is not permitted to a Brahmin, a Kshatriya, or a Vaisya" purports to state nothing more than what according to him is deducible from the *authorities* and does not refer to the existence of any *usage or consciousness* among the castes of the validity or invalidity of such marriages. In *Bai Gulab* v. *Jiwan Lal*,[1] it is remarked that while there may be disapproval of anuloma marriages there has been " no usage proved like any other fact " refusing to recognise marriages outside the caste. The decision in *Natha Nathuram* v. *Mehta Chotalal*[4] is also on the same lines. Judicial opinion in Calcutta which originally was against the validity of anuloma marriages except where they had been sanctioned by local usage is now inclined to treat such marriages as valid under Hindu law unless prohibited by usage. In *Melaram Nudial* v. *Thanooram Bamun*,[5]

1. (1921) I.L.R. 46 Bom. 871, 878.
2. (1921) 41 M.L.J. 109 : I.L.R. 44 Mad. 704.
3. (1912) 14 Bom.L.R. 547.
4. (1930) I.L.R. 55 Bom. 1.
5. (1868) 9 W.R. 552.

it was held that in regard to a marriage between a Brahmin male and a non-Brahmin girl, "local custom is the only authority by which such a marriage can be sanctioned, *the general Hindu law being against it*". In *Ram Lal Shookool* v. *Akhoy Charan Mitter*,[1] the view was taken that "the ancient Hindu law did not regard such marriages with the condemnation expressed by later authorities" and that such marriages being recognised by local custom would be valid. But in *Nalinaksha Majhi* v. *Rajanikanta Das Mohanta*,[2] it is stated that "a marriage between a Brahmin and a Sudra woman...though not an approved type of marriage is still a marriage and the children are legitimate". In the Punjab, anuloma marriages have been held to be valid both by reason of custom as also under Hindu law. In *Suram Chand* v. *Indar*,[3] Jai Lal, J., states: "the tendency of the Courts appears to be to recognise such marriages as valid and this tendency is consistent with the ordinary rule that unless clearly proved to the contrary the decision should be in favour of legality of connection between man and woman specially if the intention of the parties was to treat it as a marriage". The only decision in Madras on the validity of anuloma marriages is that of Venkatasubba Rao, J., in *Ratansi Morarji* v. *Administrator-General of Madras*.[4] This decision purports to rest on the rulings of the Bombay High Court in *Bai Gulab* v. *Jiwan Lal*[5] and *Bai Kashi* v. *Jamnadas*.[6] The efficacy of the decision is to some extent marred by an erroneous statement on p. 173 that "Chandavarkar, J., in *Bai Kashi* v. *Jamnadas*,[6] after an examination of the Smritis and Commentaries, also arrives at the conclusion that anuloma marriages are valid". Chandavarkar, J., in fact has indicated a view the other way. Among the text writers on Hindu law, while it is stated in Mayne's Hindu Law[7] that the only legal course is to treat anuloma marriages as invalid except where there is custom or enactment to the contrary, Sarkar Sastri's Hindu Law[8] propounds not merely a contrary view but declares further that even pratiloma alliances will be valid. Thus it is stated on p. 120: "The sages recognise marriage between a woman of an inferior caste and a man of a superior caste to be valid....Although marriage of an inferior man with a superior woman may be disapproved and condemned, still if such a marriage does in fact take place the same must be regarded as valid as between the parties to it and the issue legitimate. They may be ex-communicated and excluded from inheritance of their

1. (1903) 7 C.W.N. 619.
2. (1931) I.L.R. 58 Cal. 1392, 1399.
3. A.I.R. 1934 Lah. 550, 553.
4. (1928) 55 M.L.J. 478 : I.L.R. 52 Mad. 160.
5. (1921) I.L.R. 46 Bom. 871.
6. (1912) 14 Bom.L.R. 547.
7. 10th Edition, p. 127.
8. 8th Edition.

relations, but as between themselves the relationship of husband and wife, and of parent and child must be held legitimate and there must also be reciprocal heritable right among themselves—*there being no authority for pronouncing the marriage to be invalid however reprehensible the same may be represented to be.*"

That the instant decision takes a view contrary to that held by Courts during the last twenty years is clear; that it affects a question of status and as such is bound to have wide repercussions cannot be gainsaid. It is therefore up to the Legislature to resolve this conflict of judicial opinion.

DAMEL v. MANMOHANDAS LALUBHAI, I.L.R. (1940) Bom. 153.

The question at issue in this case was whether Hindu coparceners governed by the Mithakshara law, carrying on a joint family business, can institute in their individual names a suit to recover a debt on a promissory note obtained in the name of the family firm. The matter arose on a suit being brought for the recovery of the amount due under a promissory note executed in favour of a joint family business, by a member of the family to whom on partition the note had been allotted. The learned judges posit a difference between the case of a promissory note in favour of a joint family firm and the case of a note in favour of an ordinary coparcenership taken in the name of the manager or any other member of the family, holding that in the former case an action on the note will *always* lie by the coparceners whereas in the latter case it is only the payee named in the note or any person to whom it has been endorsed or assigned that can sue on it. In other words, in the former case after partition any member to whom the note has been allotted can sue on it without the necessity for any endorsement or assignment in his favour by the other members of the firm provided all of them are arrayed as parties in the action, but in the latter case a coparcener not being the maker, to whose share the note has fallen at the partition cannot sue on it in the absence of any endorsement or assignment of it in his favour by the other members of the family. Certainty is no doubt the hall-mark of a promissory note, *see* Ss. 8, 32, 78 of the Negotiable Instruments Act. "Holder" is defined in S. 8 as any person *entitled in his own name* to the possession of the note and to receive or recover the amount due thereon. S. 32 declares the liability of the maker of the note to pay according to the *apparent tenor of the note* and S. 78 lays down that payment of the amount due should be to the *holder of the instrument*. The cumulative effect of these provisions is *prima facie* that it is only the person named in the promissory note as the payee, or an endorsee or assignee thereof

that can maintain an action on the note, apart from the debt evidenced by it, though the title of the holder need not be that of the owner. The instant decision holds that the words "in his name" in S. 8 do not mean the personal name of the person and an *alias* or an assumed name will fall within the meaning of those words. A firm has in fact no independent entity apart from the partners and a suit by the firm is really a suit by all the members of it, see *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal and Co.*[1] Where the firm is dissolved even then a decree on the note can be given in its favour if all the members of the firm are made parties to the action. Where however the note is allotted to the share of any one member it is difficult to see how his position will be different from that of a member of a joint Hindu family to whose share at a family partition a promissory note in favour of the joint family has been allotted, with reference to the maintainability of an action on such note and the obtaining of a decree in his favour, without any assignment or endorsement on the part of the other members of the family, even if a strict construction of S. 78 is favoured. Anyway it is submitted that there is no warrant for drawing a distinction between these two classes of cases in this respect.

On the construction of Ss. 8 and 78 there have been two schools of judicial opinion. The equitable view has found expression in *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal and Co*[1] where it has been remarked that it would be going too far to say that S. 78 of the Act "prohibits any person other than the holder to bring a suit, if that person is the true owner. If that were the intention of the Legislature..... it would have been quite simple to state that 'no person except the holder would be entitled to institute any suit on the instrument'. No such thing has been stated in any portion of the Act".[2] A stricter view, namely that the holder of the note is alone entitled to sue on the note has been taken by certain other decisions.[3]

Even if the latter construction of S. 78 is the correct one, endorsement and assignment are not necessarily the only modes by which the right to sue on the promissory note can arise. The

1. (1927) I.L.R. 55 Cal. 551.

2. See also *Sarjug Singh* v *Deosaran Singh*, A.I.R. 1930 Pat. 818, *Surajman Prasad* v. *Sadanand*, A.I.R. 1932 Pat. 34, *Ramnagina Prasad* v. *Bishwanath Prasad*, A.I.R. 1934 Pat. 85, *Sewa Ram* v. *Hoti Lal*, (1931) I.L.R. 53 All. 5.

3. *Ramanuja Aiyangar* v. *Sadagopa Aiyangar*, (1904) 15 M.L.J. 249 : I.L.R. 28 Mad. 205, *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*, (1906) 16 M.L.J. 508 : 30 Mad. 88, *Harkishore Barna* v. *Gura Mia Chaudhuri*, (1930) I.L.R. 58 Cal. 752, 755, *Krishnaji* v. *Hanmaraddi*, (1934) I.L.R. 58 Bom. 536, 542, *Virappa* v. *Mahadevappa*, (1934) 36 Bom.L.R. 807.

property in the promissory note may stand transferred by an award of arbitrators or by a proper partition or family arrangement, and the person taking the promissory note in that way may sue on the note and obtain a decree thereon making the other members of the family defendants in the action, without the necessity of alleging the cause of action as the original debt evidenced by the promissory note. As pointed out in *Subbarayudu* v. *Subbarayudu*,[1] where the question was whether a suit on a promissory note was maintainable by a person to whom it was allotted by an award of arbitrators made in a dispute between him and the payee under the note, in the absence of an endorsement in his favour by the latter: " the award operated as a transfer *inter alia* of the suit promissory note .... from the payee mentioned therein to the plaintiff..... There can be no doubt that the effect of the award which allotted the suit promissory note to the share of the plaintiff was to transfer the property in the suit promissory note to the plaintiff and the plaintiff is therefore entitled as the owner to maintain the suit on the promissory note" though there was no endorsement. In *Chinna Chenchu Reddi* v. *Subbaraya Chetti*,[2] following *Gopalu Pillai* v. *Kothandarama Aiyar*,[3] it has been observed that where in a partition in a joint family, a debt evidenced by a promissory note falls to the share of a member he can sue to recover the amount due under the promissory note without any endorsement of the note over to him or an assignment under S. 130 of the Transfer of Property Act and that the suit may be regarded as a suit on the original debt itself irrespective of the note. The Bombay decisions have however held otherwise. In *Krishnaji* v. *Hanmaraddi*,[4] where a promissory note had been passed in favour of the plaintiff's father in his individual name and there had been no renunciation of the world completely by the father so as to be considered civilly dead nor any endorsement or assignment by him of the note in favour of his son the plaintiff, it was held that a suit by the son on the note would be incompetent. Similarly in *Virappa* v. *Mahadevappa*,[5] where a promissory note passed in favour of the plaintiff's son was allotted to the share of the plaintiff on partition made by an award on which a decree was passed and there was no endorsement in plaintiff's favour of the note, it was held that there was no transfer of the note by operation of law, that no decree could be passed in favour of the plaintiff, but inasmuch as his son was impleaded as a party a decree on the note could be passed in favour of the son. This view suggesting that no suit on the *note* will lie in the ab-

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1. 1935 M.W.N. 282.
2. 1937 M.W.N. 184.
3. (1934) 67 M.L.J. 843.
4. (1934) I.L.R. 58 Bom. 536.
5. (1934) 36 Bom.L.R. 807.